Supreme Court, U. S.
FILED
JAN 27 1977
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1976

No. 76-900

ERIE LACKAWANNA RAILWAY COMPANY,
Petitioner,

vs.

L. F. COLE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT, L. F. COLE, IN OPPOSITION

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TABLE OF CONTENTS

RESPONDENT'S SUMMARY OF FACTS FOUND BY THE DISTRICT COURT 1

OPPOSING ARGUMENT 4

A. The United States Court of Appeals for the Sixth Circuit Has Rendered a Decision Concerning an Important Issue of Federal Law and National Labor Policy, Which Decision Is in Conflict With Prior Decisions of This Court and With Prior Decisions of the United States Court of Appeals for the Seventh Circuit 4

(1) The standards established by the Court of Appeals in regard to what is required in order for an employee to be deemed to have received "actual notice" sufficient to satisfy the notice provision of Section 3 First (j) of the Railway Labor Act are contrary to those standards established by this Court in *Elgin, J. & E. Ry. Co. v. Burley* (*Burley II*), 327 U.S. 661 (1946) 4

(2) The Court of Appeals' holding that Section 3 First (j) of the Railway Labor Act requires notice to both the employee and the union, which admittedly is representing him, is contrary to this Court's construction of the statute as stated in *Elgin, J. & E. Ry. Co. v. Burley* (*Burley I*), 325 U.S. 711 (1945), and *Czosek v. O'Mara*, 397 U.S. 25 (1970) 6

(3) The Court of Appeals' discussion of "actual notice" and what is necessary to support a finding of "actual notice" is contrary to decisions of the United States Court of Ap-

peals for the Seventh Circuit, including *Kotakis v. Elgin, J. & E. Ry. Co.*, 520 F.2d 570 (7th Cir. 1975) and *Hunter v. Atchison, T. & S. F. Ry. Co.*, 188 F.2d 294 (7th Cir. 1951) 10

B. Even Assuming the Court of Appeals' Definition of "Actual Notice" to Be a Correct One, the Court Erred in Holding That Respondent Had Not Received Such "Actual Notice" 12

RESPONDENT'S CONTENTIONS 15

A. The Lower Court Decisions Herein Were Made Pursuant to Settled Law and Are Not in Conflict With Other Decisions 15

B. There Are No Special and Important Reasons for Granting Petitioner's Writ 15

C. Other Considerations 16

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Burlington Northern, Inc. v. Am. Ry. Sup'rs Ass'n, 527 F.2d 216 (7th Cir. 1975) 13

Czosek v. O'Mara, 397 U.S. 25 (1970) 6, 10

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) 17

Elgin, J. & E. Ry. Co. v. Burley (*Burley I*), 325 U.S. 711 (1945) 6, 7, 8, 9, 10, 13, 14, 15, 16, 17

Elgin, J. & E. Ry. Co. v. Burley (*Burley II*), 327 U.S. 661 (1946) 4, 5, 8, 9, 13, 14, 16, 18

Estes v. Union Terminal Co., 5th Cir., 89 F.2d 768 (1937) 11

General Talk. Pictures Corp. v. Western El. Co., 304 U.S. 175 (1938) 5

Hunter v. Atchison, T. & S. F. Ry. Co., 188 F.2d 294 (7th Cir. 1951) 10, 11

Illinois Cent. R. Co. v. Whitehouse, 212 F.2d 22 (7th Cir. 1954) 13, 14

Kotakis v. Elgin, J. & E. Ry. Co., 520 F.2d 570 (7th Cir. 1975) 10, 11

Statutes and Rules

Railway Labor Act Sec. 3 First (j) 3, 4, 6, 10

45 U.S.C. 153 First (j) 10, 14, 15, 17

45 U.S.C. 153 Second 2

Rules of the United States Supreme Court, Rule 19 17

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BRIEF OF RESPONDENT, L. F. COLE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

L. F. Cole, Respondent, opposes Erie's Petition for Writ of Certiorari.

RESPONDENT'S SUMMARY OF FACTS FOUND BY THE DISTRICT COURT

The District Court in its February 6, 1974 Order factually determined the Respondent Cole, as a result of an incident occurring on March 11, 1971, was dismissed by Petitioner from his employment on April 7, 1971. The District Court further determined that Cole was not a member of the union after April, 1971 (App. pp. A31-A32).

The District Court in its same order found the union and the Petitioner entered into an agreement on Decem-

ber 10, 1971—some eight (8) months after Respondent Cole had been dismissed from his employment and ceased to be a member of the union—to create a special board of adjustment under the provisions of 45 U.S.C. § 153, Second, namely Public Law Board 855. The Petitioner and the union further agreed that Respondent Cole's discharge would be one of the matters submitted to this Board for decision (App. p. A31).

The District Court also found the evidence, uncontroverted by anything from Petitioner and including the Board's decision of June 1, 1972, showed Respondent received no notice of any kind, that he did not designate anyone to appear on his behalf, and that no witnesses appeared on his behalf (App. p. A32).

The District Court further found in regard to the Board's hearing, as follows:

> ". . . there is nothing in the record showing any notice to petitioner (Respondent in this Court) of any impending hearing." (App. pp. A31-A32).

In its February 6, 1974 Order, the District Court set aside and held for naught the decision of June 1, 1972, of Public Law Board No. 855 relating to Respondent's discharge. The District Court ordered that the matter be remanded to the Board for reconsideration upon due notice to Respondent and that he be given the opportunity to be heard through counsel and present witnesses on his behalf (App. pp. A36-A37).

The Respondent was given due notice of a hearing of the *reconvened* Board held on August 19th and 20th, 1974. Petitioner was present with counsel. Petitioner and the union both made hearsay presentations to the *reconvened* Board. Respondent presented five (5) witnesses who testified under oath and were cross-examined by Petitioner and

its counsel. The Board also received in evidence four (4) exhibits offered by Respondent.

On October 28, 1974, the *reconvened* Board established by the District Court's February 6, 1974 Order, entered an award restoring Respondent to duty with full seniority rights, vacation and privileges. Respondent's discharge from employment was converted to a disciplinary lay-off of 365 days, and he was awarded back pay for the time from the end of the disciplinary lay-off to the date of restoration to duty (App. p. A22).

Petitioner failed to comply with the Board's award and Respondent, by Motion for Summary Judgment, sought enforcement of the award of the *reconvened* Board. Petitioner resisted enforcement of the award. Some fifteen (15) months after the District Court's February 6, 1974 Order, Petitioner attempted to set it aside (App. p. A22).

In its May 5, 1975 Order, the District Court, after considering all the evidence, concluded that even if Petitioner were given the benefit of all favorable inferences from the evidence, Respondent had not received formal notice under § 3 First (j) of the Act and Respondent had no "actual notice" as defined by prior case law relied on by Petitioner. The District Court rejected Petitioner's claim on this issue and determined that any notice had by Respondent was not in *sufficient time* to permit him to retain counsel, gather witnesses and be present at the Board's hearing so as to be heard (App. pp. A23-A24).

The Petitioner also at that late date and for the first time argued Respondent had solely authorized the union to handle this wrongful discharge. The District Court, after considering the evidence, found Respondent had not given written authorization to the union and he had not relinquished his right to be present with counsel (App. pp. A25-A26).

Finally, the District Court in its May, 1975 Order found the undisputed evidence, on the issue of the right of Respondent to represent himself before the Board, to be that union officials knew of his interest in being present at the hearing. Further, Respondent had witnesses who would appear and testify relevant to the events leading to his dismissal, that he was told that his presence was not necessary and that he didn't need to bring his witnesses. This evidence was not refuted by Petitioner (App. p. A27).

OPPOSING ARGUMENT

In this Opposing Argument, Respondent will repeat the format of Petitioner's Argument. Each heading will be followed by Respondent's opposing arguments.

A. The United States Court of Appeals for the Sixth Circuit Has Rendered a Decision Concerning an Important Issue of Federal Law and National Labor Policy, Which Decision Is in Conflict With Prior Decisions of This Court and With Prior Decisions of the United States Court of Appeals for the Seventh Circuit.

(1) The standards established by the Court of Appeals in regard to what is required in order for an employee to be deemed to have received "actual notice" sufficient to satisfy the notice provisions of Section 3 First (j) of the Railway Labor Act are contrary to those standards established by this Court in Elgin, J. & E. Ry. Co. v. Burley (Burley II), 327 U.S. 661 (1946).

In its brief the Petitioner attempts to sustain its position by presenting only those facts in its brief that are most favorable to its position, and then arguing on those facts

that the District Court and the Sixth Circuit Court of Appeals rendered decisions which are in conflict with prior decisions of this Court and the Court of Appeals for the Seventh Circuit. The Petitioner would have this Court review the evidence in this case, and find the facts in its favor, contrary to the well established principle that a writ of certiorari will not be allowed to review evidence or inferences drawn from the evidence. *General Talk. Pictures Corp. v. Western El. Co.*, 304 U.S. 175 (1938).

The language of the Court of Appeals for the Sixth Circuit that:

> "Actual notice for this purpose is notice of the hearing for a sufficient period prior thereto to permit the employee to consult with union officials and relay such information as he possesses which might allow the union to more effectively present his claim." (App. p. A14),

is just one more statement of law pertaining to notice. It deals with only one aspect of actual notice, to-wit, the period of time the notice must be given before the hearing. This is not in conflict with the statement in *Burley II* (App. p. A17), that:

> ". . . It would require at the least, we think, knowledge on the aggrieved employee's part of the pendency of the proceedings or knowledge of such facts as would be sufficient to put him on notice of their pendency."

This statement from *Burley II* assumes that the notice would be timely. Certainly, this Court in *Burley II* never intended that notice, of whatever nature, could be considered "due notice" if it was given, for example, five minutes before the hearing.

It is submitted that "due notice" was a factual determination to be made by the District Court, based upon the facts before it at the time of its decision. At the time the District Court made its original order of February 6, 1974, Respondent's deposition was not before the Court and there was no evidence before the Court that Respondent had received any notice whatsoever.

The Sixth Circuit considered Respondent's deposition, even though it was not before the District Court on February 6, 1974, and also made a finding of fact that Respondent did not receive due notice. This Court should not grant certiorari to review this finding of fact.

(2) The Court of Appeals' holding that Section 3 First (j) of the Railway Labor Act requires notice to both the employee and the union, which admittedly is representing him, is contrary to this Court's construction of the statute as stated in Elgin, J. & E. Ry. Co. v. Burley (Burley I), 325 U.S. 711 (1945), and Czosek v. O'Mara, 397 U.S. 25 (1970).

Respondent submits this is not a correct statement. *Burley I* supports Respondent's position; it does not support Petitioner's position on this issue.

In *Burley I, Elgin, J. & E. Ry. Co. v. Burley,* 325 U.S. 711 (1945) this Court made the following statements (Page references are to 325 U.S.).

At page 727:

". . . Rights of notice, hearing and participation or representation are given. § 3, First (j)."

At pages 734 and 735:

"The Act's provisions do not require such a construction. On the contrary they appear expressly to preclude it. The proviso to Section 2, Fourth in terms reserves the right of 'an employee, *individually*' to confer with management; and Section 3, First (j), not only requires the Board to give 'due notice of all hearings *to the employee* * * * involved in any disputes submitted * * *,' but provides for 'parties' to be heard 'either *in person,* by counsel, or by other representatives, as they may respectively elect.'

"These provisions would be inapposite if the collective agent, normally a labor union and an unincorporated association, exclusively were contemplated. Such organizations do not and cannot appear and be heard 'in person.' Nor would the provision for notice 'to *the employee* * * * involved in any dispute' be either appropriate or necessary. If only the collective representative were given rights of submission, notice, appearance and representation, language more aptly designed so to limit those rights was readily available and was essential for the purpose."

At page 746:

". . . The matter requires some explication in the light of the view we have taken concerning the rights of an aggrieved employee in the settlement of grievances. In that view no valid settlement can be made unless he agrees. If settlement by agreement after negotiation fails, he has the right to submit the dispute to the Board for decision. If it is submitted he has rights of notice, hearing and individual representation according to his choice."

Burley II, Elgin, J. & E. Ry. Co. v. Burley, 327 U.S. 661 (1946), did not change the law as announced in *Burley I, supra.*

> "We adhere to our decision rendered in the opinion filed after the first argument. 325 U.S. 711, 65 S.Ct. 1282. [1] That opinion expressly refrained from undertaking to make a definitive statement of what might be sufficient evidence of the collective agent's authority either to settle finally the aggrieved individual employee's claims or to represent him exclusively before the adjustment Board. We do not attempt to do so now . . ."

1. The petition for rehearing, which resulted in setting the case for reargument, was supported by motions filed amicus curiae by various labor organizations and by the office of the Solicitor General. Upon granting of the motions, those organizations and the Solicitor General filed briefs amicus curiae and the latter participated in the argument. Various positions were taken upon the merits which we have considered but do not find it necessary to set forth.

The briefs amicus curiae, mentioned in footnote 1, *supra*, were reviewed by Mr. Justice Frankfurter in his dissent in *Burley II, supra.* In general these briefs were to the effect that *Burley I* "created havoc in the railroad world" (327 U.S. at 674) by its decision that:

> "An award of the Railroad Adjustment Board cannot be effective against aggrieved employee unless he is represented individually in the proceedings in accordance with rights of notice and appearance or representation granted to him by statute, and mere proof that collective agent appeared and purported to act for

> employee is insufficient, but proof that a collective agent was in some legally sufficient way authorized by the employee to act in his behalf is necessary. Railway Labor Act 1934, Sec. 2, subds. 1-4, 6, 8, Sec. 3, subd. 1 (i, j, m, p), 45 U.S.C.A. Sec. 152, subds. 1-4, 6, 8, Sec. 153, subd. 1 (i, j, m, p)." *Burley I*, Syllabus 10, *supra.*

This is the law that was followed by the District Court and the Sixth Circuit in making their decisions.

These courts followed the statement of law that ". . . mere proof that collective agent appeared and purported to act for employee is insufficient." There is no reason for this court to grant certiorari to reconsider this statement. This statement of law was definitely decided by *Burley II*. Mr. Justice Frankfurter in his dissent in *Burley II* at page 673 (327 U.S.) quotes from a brief submitted by the Congress of Industrial Organization and other labor unions as amici curiae as follows:

> "We submit the act requires union settlements with the right accorded to the employee to present grievances but not to participate in their disposition."

This proposition, which is what Petitioner contends, was not accepted by this Court when it decided *Burley I* and *Burley II*.

In addition, the lower courts herein applied the statement of law that ". . . proof that a collective agent was in some legally sufficient way authorized by the employee to act in his behalf is necessary." The District Court, in effect, found that the union was not in some legally sufficient way authorized by Respondent to act on his behalf. The Sixth Circuit affirmed, approving this statement of law. Thus, there is no conflict in the Sixth Circuit decision and *Burley I*.

The interpretation of 45 U.S.C. 153 First (j) is not an important question of federal law which has not been, but should be, settled by this Court. The question was settled by *Burley I* on June 11, 1945. Apparently Congress is satisfied with this Court's interpretation of 45 U.S.C. 153 First (j), since, in over thirty years since the *Burley I* decision, Congress has not amended the statute.

The Court did not construe Section 3, First (j) of the Railway Labor Act in *Czosek v. O'Mara*, 397 U.S. 25 (1970), and this *Czosek* case is not authority for Petitioner's contention that notice is not required to the employee.

(3) The Court of Appeals' discussion of "actual notice" and what is necessary to support a finding of "actual notice" is contrary to decisions of the United States Court of Appeals for the Seventh Circuit, including Kotakis v. Elgin, J. & E. Ry. Co., 520 F.2d 570 (7th Cir. 1975) and Hunter v. Atchison, T. & S. F. Ry. Co., 188 F.2d 294 (7th Cir. 1951).

Due notice is a requirement of the Railway Labor Act. 45 U.S.C. 153 First (j). The case of *Kotakis v. Elgin, J. & E. Ry. Co.*, 520 F.2d 570 (7th Cir. 1975), had nothing to do with a failure to comply with the requirements of the Railway Labor Act. The Court stated on page 574:

> "This statute shows that the findings of the Board are conclusive except in three instances. Count I of the Complaint does not charge that the Third Division failed to comply with the requirements of the Railway Labor Act or that there was fraud or corruption by a member of the Third Division. Instead, plaintiff argues that the Board's order was not confined to matters within the scope of the Third Division's jurisdiction. We disagree."

The Court further stated on page 576:

> "As to plaintiff's conteniton that the Adjustment Board award was a nullity for failure to provide him written notice of the Board's hearings under Section 3 First (j) of the Act (45 U.S.C. § 153 First (j)), since Count I of the complaint does not attack the failure of the Board to give such notice and no such argument was made in the district court, it is not properly before us . . ."

The *Kotakis* case (7th Circuit) is not contrary to the Sixth Circuit's decision herein since the matter of the ". . . failure of the board to give such notice . . ." was not before the Court in the *Kotakis* case.

Also, there is no conflict between the Sixth Circuit decision herein and the case of *Hunter v. Atchison, T. & S. F. Ry. Co.*, 188 F.2d 294 (7th Cir. 1951). Syllabus 9 of *Hunter* is:

> "Under Railway Labor Act provision that due notice of all hearings should be given to employees and carriers involved in any disputes submitted to Railroad Adjustment Board, actual notice for sufficient period before hearings to permit persons involved to be present and to be heard is sufficient. Railway Labor Act, § 3, subd. 1 (j), 45 U.S.C.A. § 153, subd. 1 (j)."

And on page 301, the Court stated:

> "The statute requires the Adjustment Board to give due notice of all hearings to the employees involved in the dispute before it, and not merely notice of the fact that proceedings may be pending before the Board."

The *Hunter* opinion, on page 300, quotes from *Estes v. Union Terminal Co.*, 5th Cir., 89 F.2d 768, that:

". . . But in justice and fairness every person who may be adversely affected by an order entered by the Board should be given reasonable notice of the hearing. . . . No man should be deprived of his means of livelihood without a fair opportunity to defend himself. Plainly, that is the intent of the law. . . ."

This is the tenor of the decision of the District Court herein, which was affirmed by the Sixth Circuit. There is no conflict in the understanding of the law by the Fifth, Sixth or Seventh Circuits.

B. Even Assuming the Court of Appeals' Definition of "Actual Notice" to Be a Correct One, the Court Erred in Holding That Respondent Had Not Received Such "Actual Notice".

In its first paragraph under this contention the Petitioner is incorrect in stating the majority admits that: "(4) both the union and the employee knew in advance when the hearing before the board was scheduled (App. p. A16)." What the majority said was, ". . . that he knew in advance that the Board would be conducting a hearing on his claim." There is nothing in the record that shows that Respondent knew the date, time and address of the hearing. Also, Petitioner glosses over the ramifications of the fact that Respondent was not a member of the union after his discharge.

The decision of the District Court that Respondent did not receive "due notice" was a finding of fact. A petition for writ of certiorari should not be granted to review evidence or inferences drawn therefrom.

Under this heading, the Petitioner attempts to argue that as a result of the Sixth Circuit decision the carrier is placed in an untenable position. This is not true. The

Sixth Circuit followed the law as set out in *Burley I* and affirmed in *Burley II*. The carrier is in no different position now than it was prior to the Sixth Circuit decision.

In this case the Petitioner, a carrier, is objecting to notice to the employee. In other cases carriers have taken the opposite position. Compare, *Illinois Cent. R. Co. v. Whitehouse*, 212 F.2d 22 (7th Cir. 1954), where the Court stated on page 29:

". . . The reasoning in *Kirby v. Pennsylvania, R. Co.*, 3 Cir., 188 F.2d 793, 799, is pertinent, wherein the Court stated: 'Until the statutory requirements are met, it (the Board) has no more standing to produce legally effective orders than any voluntary group of citizens. Anyone to be affected by the purported order can raise the point that it has no legal foundation. We conclude that defendant carrier may raise the point that employees involved in the dispute had no notice or knowledge of the hearing, and no opportunity to be heard before the Adjustment Board. A party is entitled to an award that will protect it in the event that it complies'."

and *Burlington Northern, Inc. v. Am. Ry. Sup'rs Ass'n*, 527 F.2d 216 (7th Cir. 1975) where the Court stated on page 219:

"The Railroad contends that Awards 2714 and 2715 are void because Beffert and Ferrell were not given notice of the Adjustment Board proceedings under Section 3 First (j) of the Railway Labor Act (45 U.S.C. § 153 First (j), which provides in pertinent part that 'the several divisions of the Adjustment Board shall give due notice of all hearings to the

employee or employees and the carrier or carriers involved in any dispute submitted to them'."

The real problem, in cases such as this, is the Board's constant refusal to give formal notice to the employee as required by 45 U.S.C. 153 First (j), *Burley I* and *Burley II*.

In *Illinois Central R. Co. v. Whitehouse, supra,* the Court stated on page 29:

". . . Such being the situation, the Board cannot hide behind the pretext that actual notice is sufficient and at the same time say that only those given formal notice will be heard. But it is asserted that the Clerks and Shears had no desire to be heard. Even so, that is beside the issue and no concern of the Board. The point is that the Board must accord the opportunity to be heard. When that has been done, the beneficiary of the right may exercise it or not, as he (or it) sees fit. It is difficult to understand why the Board persists in its refusal to give formal notice when such refusal, as the cases disclose, oftentimes furnishes the basis for protracted litigation. Instead of serving as an agency for the prompt and expeditious settlement of labor disputes, it lends itself to the incubation of controversy and further dispute."

RESPONDENT'S CONTENTIONS

A. The Lower Court Decisions Herein Were Made Pursuant to Settled Law and Are Not in Conflict With Other Decisions.

This Court in *Burley I*, decided June 11, 1945, fully interpreted 45 U.S.C. 153 First (j). The pronouncements of this Court in *Burley I* have not been altered by subsequent decisions of this Court, or by any change in the statute by Congress, and there is no conflict with Appellate Court decisions since the Appellate Courts know and understand *Burley I*. Since the lower court decisions were made pursuant to settled law and are not in conflict with other decisions, the Writ should be denied.

B. There Are No Special and Important Reasons for Granting Petitioner's Writ.

What has happened in this case now before this Court is that the District Court made a factual determination in its Opinion and Order of February 6, 1974 (App. p. A29), that the Petitioner failed to prove that it "was in some legally sufficient way authorized by the employee (Respondent) to act in his behalf." *Burley I*, Syllabus 10, *supra.*

This factual determination was correct. Judge Walinski, in his Opinion and Order filed February 6, 1974 (App. p. 29), stated (App. pp. 35, 36):

"It is apparent to this Court that Public Law Board No. 855 failed to comply with the requirements of subsection (j). The record shows that petitioner was not sent, and did not receive, any notice that his petition was being considered by the Board. Hav-

ing been deprived of due notice, he was surely deprived of the right to appear either in person or through counsel as the statute permits.

"This Court is further unable to understand how petitioner could have been represented by a union of which he was no longer a member. The rights of this petitioner in claiming his former position are too important to be waived away with the airy contention that the union represented him. This Court questions the vigor of a union representing a former member from whom it no longer receives monthly dues. For this reason, this Court holds that petitioner was not represented before the Board and that its decision must be set aside. See, *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U.S. 711, 748 (1945). Compare *Ellerd v. Southern Pacific R. Co.*, 241 F.2d 541 (7th Cir. 1957)."

In this case, the District Court simply found certain facts to be true and applied the settled law of the *Burley* cases to these facts. There is nothing special or important about a decision so rendered and the Writ should be denied.

C. Other Considerations.

Petitioner in its QUESTION PRESENTED (App. p. 2) intimates that the lower court decisions allowed Respondent to "stand by with knowledge and notice of what is going on, allow matters to be thrashed out to a conclusion before the Board, and, after a decision adverse to him has been rendered by the Board, come in for the first time to assert his individual rights." This is not what happened. The lower courts found Respondent had no knowledge or notice. There is no special or important reason why this Court should grant the Writ to review these findings.

In addition, if the Petitioner thought the District Court's decision of February 4, 1974, was so erroneous as to warrant review by this Court, the Petitioner could have appealed it as a final order. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). At that time the Petitioner must not have felt that the order of February 6, 1974, was so erroneous as to meet the Considerations Governing Review on Certiorari (Rule 19) or it would have appealed immediately. Instead, Petitioner took its chances before the *reconvened* board and then, after losing before the *reconvened* board, in the District Court and in the Sixth Circuit, determined that the February 6, 1974, order should be reviewed by this Court. In effect, the Petitioner allowed matters to be thrashed out to a conclusion before the *reconvened* board, and, after a decision adverse to it was rendered by the *reconvened* board, started for the first time to assert rights which it did not feel were important prior to the adverse decision of the *reconvened* board.

Petitioner belatedly contends that unless this Court grants its Writ and, by implication, reverses the Sixth Circuit, that an impossible burden will be placed upon the carrier with concomitant dire consequences (App. p. A24, A25). If this is true now, it was true on February 6, 1974, and the Petitioner, because of the purported seriousness of it, should have appealed the District Court's decision of that date. Since the Petitioner did not appeal at that time, it can only be surmised that the seriousness of the matter is magnified by the fact that this is Petitioner's last opportunity to win its case.

There is no burden placed on the carrier by the lower court decisions. The burden, which has been there for thirty (30) years, is upon the Board to give formal notice as required by 45 U.S.C. 153 First (j) *Burley I* and *Burley*

II. This is not an impossible burden. The giving of formal notice by courts and other hearing officers is commonplace and there is no reason it cannot be done in cases such as this.

The considerations, submitted by Petitioner in its Writ, appear to be submitted for the sole reason that Petitioner wants the decision of the *reconvened* Board reversed. This is not a valid reason to grant certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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